Abdul Rashid bin Maidin & Ors v Lian Mong Yee

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–4 OF 2005
ABDUL AZIZ MOHAMAD, HASHIM YUSOFF AND ZULKEFLI JJCA
18 SEPTEMBER 2007

Civil Procedure — Judgments and orders — Consent judgment — Payment made pursuant to consent judgment in return for defendant's withdrawal of complaints and police reports lodged against plaintiffs — No finding of 'coercion' under s 73 of Contracts Act 1950 — Whether parties in pari delicto

The defendant/respondent filed an action against the plaintiffs/appellants in the Kuala Lumpur High Court ('the D1 action') claiming inter alia specific performance of an agreement dated 20 October 1995, alternatively, a refund of the sum of RM7.5m paid by him and damages. Before the D1 action went for trial, a consent judgment was recorded whereby the plaintiffs agreed to pay the defendant the sum of RM32.1m in full and final settlement. It was a term of the consent judgment that the defendant will write to the relevant authorities for permission to withdraw the complaints and police reports lodged by him against the plaintiffs or some of them. Pursuant to the consent judgment, the defendant only received payment of the sum of RM5.1m and the plaintiffs thereafter defaulted in making payment of the balance sum. Upon the plaintiffs' default, the defendant commenced bankruptcy and winding up proceedings against the plaintiffs. In December 1997, the plaintiffs filed an originating summons ('OS') in the Shah Alam High Court against the defendant to set aside the consent judgment on the ground that it amounted to an illegal agreement to stifle prosecution. The plaintiffs succeeded in the Shah Alam OS and obtained orders in terms of the OS on 17 April 1998 and the court of appeal on 20 August 2000 affirmed the order of the setting aside of the consent judgment on the ground that it amounted to an illegal agreement to stifle prosecution. Thereafter, the plaintiffs' filed an application by way of summons in chambers on 22 April 2004 for orders inter alia that there were still live issues to be determined and tried in the Shah Alam OS on their previous claim for the sum of RM5.1m which was paid to the defendant pursuant to the consent judgment which was set aside. The high court dismissed the plaintiffs' application.

Held, dismissing the appeal:

(1) The High Court in the Shah Alam OS ought to have denied the plaintiffs' prayer for the refund of the RM5.1m on two grounds. Firstly, the plaintiffs had simply failed to prove that it was paid under coercion; and secondly, the parties were in pari delicto and the loss must lie where it fell and the court ought not to have assisted any party to the illegal agreement (see para 5).

(2) It was also the court's judgment that the plaintiffs' application filed by way of summons in chambers on 22 April 2004 for orders inter alia that there were still live issues to be determined and tried in the Shah Alam OS was misconceived and defective. The court found that by then the High Court in the Shah Alam OS was functus officio upon making the final order dated 17 April 1998 on the conclusion of the hearing of the OS, since the order had already been drawn up and perfected. It was also to be noted that the court of appeal had set aside that part of the order of the High Court relating to the RM5.1m on the additional ground that the parties were in pari delicto. It amounted to a decision by the court of appeal that the sum was to remain with the defendant. There was therefore no longer any live issue relating to that sum in the Shah Alam OS (see para 5).

(3) Furthermore the court took the view that an action filed by way of an originating summons is an originating process, while a summons in chambers is a subsidiary process which draws its life from the originating process. In the context of the present case, when the originating process was fully heard and finally disposed of, the cause of action was extinguished and no further application of a fresh and substantial nature might be made by the plaintiffs by way of a summons in chambers save those specifically permitted or directed by the original orders of the court (see para 6); *Hengwell Development Pte Ltd v Thing Chiang Ching* [2003] 3 SLR 84 referred.

[Bahasa Malaysia summary

Defendan/responden memfailkan satu tindakan terhadap plaintif-plaintif/perayu-perayu di Mahkamah Tinggi Kuala Lumpur ('tindakan D1') menuntut inter alia pelaksanaan spesifik satu perjanjian bertarikh 20 Oktober 1995, atau secara alternatif, pengembalian jumlah RM7.5j yang dibayar olehnya dan ganti rugi. Sebelum tindakan D1 dibicarakan, satu penghakiman persetujuan direkodkan di mana plaintif-plaintif bersetuju membayar defendan jumlah RM32.1j sebagai bayaran penuh dan muktamad. Ia adalah satu terma penghakiman persetujuan bahawa defendan akan menulis kepada pihak-pihak berkuasa yang relevan untuk kebenaran menarik balik aduan-aduan dan

laporan-laporan polis yang dibuatnya terhadap plaintif-plaintif atau sebahagian daripada mereka. Mengikut penghakiman persetujuan tersebut, defendan hanya menerima bayaran untuk jumlah RM5.1j dan plaintif-plaintif seterusnya ingkar dalam membuat bayaran baki jumlah tersebut. Selepas keingkaran plaintif-plaintif membayar, defendan memulakan prosiding-prosiding kebankrapan dan penggulungan terhadap plaintif-plaintif. Pada Disember 1997, plaintif-plaintif memfailkan satu saman pemula ('SP') di mahkamah tinggi Shah Alam terhadap defendan untuk mengenepikan penghakiman persetujuan atas alasan bahawa ia adalah sama seperti satu perjanjian yang menyalahi undang-undang untuk menyekat pendakwaan. Plaintif-plaintif berjaya dalam OS Shah Alam mereka tersebut dan memperoleh perintah-perintah seperti di dalam OS pada 17 April 1998 dan mahkamah rayuan pada 20 Ogos 2000 mengekalkan perintah mengenepikan penghakiman persetujuan atas alasan bahawa ia adalah sama seperti satu perjanjian yang menyalahi undang-undang untuk menyekat pendakwaan. Selepas itu, plaintif-plaintif telah memfailkan satu permohonan melalui saman dalam kamar pada 22 April 2004 untuk perintah-perintah inter alia bahawa terdapat isu-isu hidup untuk diputuskan dan dibicarakan di SP Shah Alam berdasarkan tuntutan mereka yang lepas untuk jumlah RM5.1j yang dibayar kepada defendan mengikut penghakiman persetujuan yang telah diketepikan. Mahkamah tinggi menolak permohonan plaintif-plaintif.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah Tinggi di SP Shah Alam sepatutnya menolak permohonan-permohonan plaintif-plaintif untuk pengembalian RM5.1j berdasarkan dua alasan. Pertamanya, plaintif-plaintif telah gagal membuktikan bahawa ia dibayar di bawah paksaan; dan keduanya, pihak-pihak adalah dalam pari delicto dan kehilangan tersebut mestilah kekal di mana ia jatuh dan mahkamah tidak sepatutnya menolong mana-mana pihak kepada perjanjian yang menyalahi undang-undang tersebut (lihat perenggan 5).

(2) Ia juga adalah penghakiman mahkamah bahawa permohonan plaintif-plaintif yang difailkan melalui saman dalam kamar pada 22 April 2004 untuk perintah-perintah inter alia bahawa terdapat isu-isu hidup yang patut diputuskan dan dibicarakan di SP Shah Alam adalah salah faham dan cacat. Mahkamah memutuskan bahawa pada masa tersebut Mahkamah Tinggi SP Shah Alam telahpun functus officio selepas membuat perintah muktamad bertarikh 17 April 1998 setelah tamat pendengaran OS tersebut, oleh kerana perintah telahpun dikeluarkan dan disempurnakan. Ia juga patut diperhatikan bahawa mahkamah rayuan telah mengenepikan bahagian perintah mahkamah

tinggi yang berhubung dengan RM5.1j tersebut atas alasan tambahan bahawa pihak-pihak telahpun pari delicto. Ia membawa kepada satu keputusan oleh mahkamah rayuan bahawa jumlah tersebut patut ditinggalkan dengan defendan. Dengan itu tiada lagi sebarang isu yang hidup lagi berhubungan dengan jumlah tersebut di SP Shah Alam (lihat perenggan 5).

(3) Lanjutan itu, mahkamah juga berpendapat bahawa satu tindakan yang difailkan melalui saman pemula adalah satu proses pemula, sementara satu saman dalam kamar adalah satu proses subsidiari yang mendapatkan nyawanya daripada proses pemula tersebut. Dalam konteks kes ini, apabila proses pemula yang didengarkan sepenuhnya dan diselesaikan secara muktamad, kausa tindakan telahpun dihapuskan dan tiada permohonan lanjutan yang bersifat cukup besar dan baru boleh dibuat oleh plaintif-plaintif melalui saman dalam kamar kecuali yang dibenarkan atau diarahkan oleh perintah-perintah asal mahkamah tersebut (lihat perenggan 6); *Hengwell Development Pte Ltd v Thing Chiang Ching* [2003] 3 SLR 84 dirujuk.]

Notes

For cases on consent judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4064–4065.

Cases referred to

Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd [2005] 1 MLJ 57 (refd)

Hengwell Development Pte Ltd v Thing Chiang Ching [2003] 3 SLR 84 (refd)

Legislation referred to

Contracts Act 1950 s 73

Appeal from: Originating Summons No MT1–24–786 of 1997 (High Court, Shah Alam)

KS Narayanan (A Vishnu Kumar with him) (KS Narayanan Associates) for the for the appellants.

K Ananthan (CL Wong with him) (Skrine) for the respondent.

Zulkefli JCA (now FCJ, delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the plaintiffs against the decision of the High Court at Kuala Lumpur in dismissing the plaintiffs' application filed by way of

summons in chambers dated 22 April 2004 wherein the plaintiffs had sought the following orders:

(1) that there are live issues to be determined and tried in the Shah Alam High Court Originating Summons No MT1–24–786–97;

(2) the Shah Alam High Court Originating Summons No MT1–24–786–97 be consolidated and/or heard and tried together with Kuala Lumpur High Court Suit No D1–22–16–96;

(3) that upon and in the event this Honourable Court grants prayers 1 and 2 above, the following consequential orders be granted:

(a) the originating summons in the Shah Alam High Court Originating Summons No MT 1–24–786–97 be converted into a writ action;

(b) that the two affidavits in the said Shah Alam High Court Originating Summons No MT 1–24–786–97 namely the Affidavit of Abdul Rashid bin Maidin affirmed on 19 December 1997 and the affidavit of Lian Mong Yee affirmed on 7 January 1998, shall stand as pleadings whereby the affidavit of Abdul Rashid bin Maidin affirmed on 19 December 1997 shall stand as statement of claim and the affidavit of Lian Mong Yee affirmed on 7 January 1998 shall stand as defence; and

(c) the documents annexed and enclosed in the affidavit of Abdul Rashid bin Maidin affirmed on 19 December 1997 and the affidavit of Lian Mong Yee affirmed on 7 January 1998 of the said Shah Alam High Court Originating Summons No MT1–24–786–97, shall respectively stand as the plaintiffs' bundle of documents and the defendant's bundle of documents;

(4) costs in the cause;

(5) such further and other orders, directions and relief as this honourable court deems fit and just.

BACKGROUND FACTS

[2] The relevant background facts of the case which are not disputed by the plaintiffs and the defendant are as follows:

(1) The defendant filed an action against the plaintiffs in Suit No D1–22–16–1996 in the Kuala Lumpur High Court ('the D1 action') claiming inter alia specific performance of an agreement dated 20 October 1995, alternatively, a refund of the sum of RM7.5m paid by him and damages.

(2) The D1 action was fixed for trial on 15 October 1996. On that day, a consent judgment was recorded whereby the plaintiffs agreed to pay the defendant the sum of RM32.1m in full and final settlement. It was a term of the consent judgment that the defendant will write to the relevant authorities for permission to withdraw the complaints and police reports lodged by him against the plaintiffs or some of them ('the term relating to the police reports').

(3) Puruant to the consent judgment, the defendant only received payment of the sum of RM5.1m and the plaintiffs thereafter defaulted in making payment of the balance sum.

(4) Upon the plaintiffs' default, the defendant commenced bankruptcy and winding up proceedings against the plaintiffs.

(5) In December 1997, the plaintiffs filed an Originating Summons ('OS') in the Shah Alam High Court vide Originating Summons No MT1–24–786–1997 ('the Shah Alam OS') against the defendant to set aside the consent judgment on the ground that it amounted to an illegal agreement to stifle prosecution. That allegation was based on the term relating to the police reports in the consent judgment.

(6) The prayers in the Shah Alam OS were as follows:

(a) that the consent judgment in the D1 action be set aside;

(b) that the D1 action be transferred to the Shah Alam High Court for trial;

(c) that all execution proceedings by the defendant be set aside; and

(d) that the payment of RM5.1m paid pursuant to the consent judgment be deposited into court or repaid to the plaintiffs.

(7) The plaintiffs succeeded in the Shah Alam OS and obtained orders in terms of the OS on 17 April 1998. The Court ordered that the consent judgment be set aside, the D1 action be transferred to the Shah Alam High Court and the sum of RM5.1m be paid into court.

(8) Upon appeal by the defendant to the Court of Appeal, the Court of Appeal on 20 August 2000 affirmed the order of the setting aside of the consent judgment on the ground that it amounted to an illegal agreement to stifle prosecution but set aside the other consequential orders made by the learned High Court judge, including the order for transfer of the D1 action to the Shah Alam High Court and the order for the payment of the RM5.1m into the Shah Alam High Court.

(9) The defendant's application to the Federal Court for leave to appeal against part of the decision of the Court of Appeal was refused by the Federal Court.

(10) Upon an application by the plaintiffs, the learned judge of the High Court at Shah Alam on 28 October 2002 made an order that whether there was a live issue or not in the Shah Alam OS should be decided by the Kuala Lumpur High Court in the D1 action and that the Shah Alam OS be transferred to the D1 action. It was further ordered that the Shah Alam High Court shall administratively transfer the Shah Alam OS to the Registry of the Kuala Lumpur High Court Commercial No 1.

(11) Thereafter, on 22 April 2004, the plaintiffs filed a summons in chambers in the Shah Alam OS for orders inter alia that there are still live issues to be determined and tried in the Shah Alam OS, that the Shah Alam OS be consolidated and tried together with the D1 action and for the conversion of the Shah Alam OS into a writ action ('the plaintiffs' application').

(12) The plaintiffs' application was dismissed with costs by the learned judge in the D1 action on 24 November 2004 after hearing submissions. The plaintiffs now appeal to this court against the decision of the learned judge in the D1 action.

DECISION ON APPEAL

[3] We heard the appeal by the plaintiffs on 11 October 2005 and we dismissed it. We now give the reasons for our decision as follows:

[4] The so-called 'live' issue to be determined and tried as contended by the plaintiffs relates to their claim for the sum of RM5.1m which was paid to the defendant pursuant to the consent judgment which was set aside by the Shah Alam High Court on 17 April 1998. We noted that in the Shah Alam OS, learned counsel for the defendant had submitted that even if the consent judgment amounted to an illegal agreement, the parties were in pari delicto and the loss must lie where it falls and the plaintiffs were not entitled to any refund of the RM5.1m (see p 193 of appeal record), However, the learned judge in the Shah Alam OS held in his judgment that pursuant to s 73 of the Contracts Act 1950, what was required to be shown was the presence of coercion in a general sense. His Lordship amongst others held that the RM5.1m was paid pursuant to an agreement which was found to be stifling prosecution, the position of the parties was unequal and the parties were not in pari delicto. His Lordship accordingly ordered the RM5.1m to be deposited into court pending the disposal of the D1 action. It is pertinent to note on this point that in the Court of Appeal, Gopal Sri Ram JCA in delivering the judgment of the court relating to this case had this to say on the issue of coercion:

However, that is not the case here. As I have pointed out during argument, there is nothing in the judge's judgment that finds such facts [on coercion]. Indeed, respondents' counsel conceded that to be the case. As against that, there is the admission by the respondents that they asked for the term [relating to the police reports]. There may have been coercion. There may not. It is not a matter upon which a finding can be made on mere affidavit evidence. I think there is much force in the appellant's argument that relief in respect of the repayment ought to have been denied at least on the ground that the respondents had not proved coercion within s 73 of the Contracts Act 1950. But I think that relief on this count should be denied on the additional ground also advanced by the appellant, namely, that the respondents were in pari delicto. The oppression and abject submission that was present in *Smith v Cuff* is simply absent here. Accordingly, I come to the conclusion that so much of the judge's order that requires the appellant to pay the sum of RM5.1m must be set aside (see pp 222–223 of Appeal Record).

[5] We were of the view, based on the above observation made by the Court of Appeal, that the High Court in the Shah Alam OS ought to have denied the plaintiffs' prayer for the refund of the RM5.1m on two grounds. Firstly, the plaintiffs had simply failed to prove that it was paid under coercion; and secondly, the parties were in pari delicto and the loss must lie where it fell and the court ought not to have assisted any party to the illegal agreement. It was also our judgment that the plaintiffs' application filed by way of summons in chambers on 22 April 2004 was misconceived and defective. We found that by then the High Court in the Shah Alam OS was functus officio upon making the final order dated 17 April 1998 on the conclusion of the hearing of the OS, since the order had already been drawn up and perfected. It is also to be noted that the Court of Appeal had set aside that part of the order of the High Court relating to the RM5.1m on the additional ground that the parties were in pari delicto. It amounted to a decision by the Court of Appeal that the sum was to remain with the defendant. There was therefore no longer any live issue relating to that sum in the Shah Alam OS.

[6] It is trite law that after a judge has made a final order which has been perfected, he is functus officio and has no jurisdiction to amend or vary his order or re-hear the issues, save under the slip rule or where the order can be said to be a nullity (see the case of *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2005] 1 ML J 571). Furthermore we took the view that an action filed by way of an originating summons is an originating process, while a summons in chambers is a subsidiary process which draws its life from the originating process. In the context of the present case, when the originating process was fully heard and finally disposed of, the cause of action was extinguished and no further application of a fresh and substantial nature might be made by the plaintiffs by way of a summons in chambers save those specifically permitted or directed by the original orders of the court (see the

case of *Hengweli Development Pte Ltd v Thing Chiang Ching* [2003] 3 SLR 841). It was equally clear that the High Court would in any event have no jurisdiction to order the conversion of the OS into a writ action after the OS had been finally disposed of and the appeal against the order of the High Court also finally disposed of by the Court of Appeal.

CONCLUSION

[7] For the reasons stated we dismissed the plaintiffs' appeal with costs and made an order that the deposits be paid to the defendant to account of taxed costs.

Appeal dismissed.

Reported by Sally Kee